LEMBAGA TATATERTIB PERKHIDMATAN AWAM HOSPITAL BESAR PULAU PINANG & ANOR

v.

UTRA BADI K PERUMAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: P-01-185-96]
13 APRIL 2000

ADMINISTRATIVE LAW: *Dismissal - Public servant - Procedural fairness - Opportunity to be heard - Respondent not afforded opportunity to make representation before punishment was imposed - Whether disciplinary proceedings fatally flawed - Whether disciplinary authority committed procedural unfairness - Whether dismissal null and void*

CONSTITUTIONAL LAW: *Federal Constitution - Articles 5(1) and 8(1) - Effect of - Expression "life" therein - Whether includes a person's reputation*

The respondent is a Hospital Attendant attached to the General Hospital, Penang. In 1991 the respondent was dismissed from service pursuant to the provisions of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 ('the Code'). The dismissal was meted out by the first appellant upon allegation that the respondent was a drug addict.

The facts showed that, at the relevant disciplinary proceedings, the respondent was accorded the opportunity to be heard in answer to the charge, but was denied the right to plead in mitigation before punishment was imposed. The respondent maintained that he was entitled in law to be heard as to his plea in mitigation, and in the circumstances applied for a declaration that his dismissal was null and void. Before the learned judge, the appellants argued that they were under no duty to afford the respondent the opportunity in question, relying inter alia on observations of the Supreme Court in *Inspector General of Police v. Alan Noor Kamat* ('*Alan Noor*'s case'). The learned judge held, however, that the observations in question were mere *obiter dicta*, that they did not represent the law upon the subject, and that the appellants, in the circumstances had not afforded procedural fairness to the respondent. The learned judge in the event allowed the respondent's application whereupon the appellants appealed. The main issue that arose was whether on the facts the respondent was entitled to make representations upon the question of punishment before the same was meted out on him.

Held:
Per Gopal Sri Ram JCA

[1] The Supreme Court's comments in *Alan Noor*'s case to the effect that there is no necessity to give another opportunity of being heard before punishment is imposed are mere *obiter dicta*. The *obiter dictum* is plainly wrong as it was expressed without the benefit of a mature argument upon the combined effect of arts. 5(1) and 8(1) of the Federal Constitution. Neither did it have the benefit of the views expressed in cases of high authority, including the decision of the Privy Council in *High Commissioner for India and High Commissioner for Pakistan v. Lall.*

[2] The combined effect of arts. 5(1) and 8(1) of the Federal Constitution is to demand fairness both in procedure and in substance whenever a public law decision has an adverse effect on any of the facets of a person's life. Among these facets are a person's livelihood and his reputation.

[3] Procedural fairness demands not only the right in a public servant to make representations on the truth of the charges framed against him. It includes the right, after a finding of guilt is made against him, to make representations on the question of punishment.

[4] The respondent ought to have been given an oral hearing. The respondent's challenge to the analysis report and to the identity of the urine sample cannot be rejected out of hand because of the long delay between the taking of the sample and the issuance of the show cause letter. There is also the fact that throughout the respondent's long term of service, no complaint of misconduct had ever been made against him. This was therefore a case of alleged misconduct that was manifestly unsuitable for resolution purely on the basis of written representations. The facts here demanded an oral hearing. The appellants' failure to accede to the request for such a hearing constitutes a failure to accord procedural fairness.

Siti Norma Yaakob JCA

[1] The proceedings before the first appellant were flawed in that there had been procedural unfairness and as such cannot be sustained.

[2] There were two stages in the proceedings before the first appellant. The first was the determination as to whether the alleged misconduct had been made out. Once misconduct had been established, the second stage was to determine the appropriate punishment therefor.

[2a] The right to be heard extended not only to the first stage of the proceedings before the first appellant but also to the second stage before punishment was passed. Justice and fairplay dictate that the right to plead in mitigation should have been accorded to the respondent although General Order 26 of the Code is silent on this score.

[3] The show cause letter mentioned more than one punishment if the respondent was found guilty of the alleged misconduct. From the language of the show cause letter and in the light of the alternative punishments that might be imposed, the respondent should have been given the opportunity to plead in mitigation before any punishment was meted out against him. This was in line with the provisions of General Order 23 of the Code. This reasoning too harmonises with the provisions of art. 135(2) of the Federal Constitution.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden merupakan seorang Atendan Hospital yang berkhidmat dengan Hospital Besar, Pulau Pinang. Pada tahun 1991 responden telah diberhentikan daripada perkhidmatan selaras dengan peruntukan-peruntukan Perintah-Perintah Am Pegawai Awam (Kelakuan dan Disiplin) (Bab D) 1980 ('Kanun tersebut'). Pemecatan tersebut telah dikenakan oleh perayu pertama atas dakwaan bahawa responden merupakan seorang penagih dadah.

Fakta menunjukkan bahawa, di prosiding tatatertib yang berkenaan, responden telah diberi peluang untuk didengar sebagai jawapan kepada pertuduhan tersebut, tetapi telah tidak diberikan hak untuk merayu bagi mengurangkan hukuman sebelum hukuman dikenakan. Responden mengatakan bahawa beliau berhak di sisi undang-undang untuk didengar berhubung dengan rayuan beliau untuk mengurangkan hukuman, dan dalam keadaan tersebut telah memohon untuk satu pengisytiharan bahawa pemecatan beliau adalah batal dan tak sah. Di hadapan hakim yang bijaksana, perayu-perayu berhujah bahawa mereka tidak mempunyai kewajipan untuk memberikan responden peluang yang dipersoalkan itu, dengan bergantung, antara lainnya, pada pandangan Mahkamah Agong dalam *Inspector General of Police v. Alan Noor Kamal* ('kes *Alan Noor*"). Hakim yang bijaksana memutuskan, walaubagaimanapun, bahawa pandangan-pandangan tersebut adalah semata-mata *obiter dicta*, bahawa ianya tidak mewakili undang-undang berdasarkan hal-perkara tersebut, dan bahawa perayu-perayu, dengan itu, tidak memberikan keadilan menurut prosedur kepada responden. Hakim yang bijaksana oleh itu telah

membenarkan permohonan responden di atas yang mana perayu-perayu telah merayu. Isu utama yang berbangkit adalah sama ada berdasarkan undang-undang responden berhak untuk membuat representasi mengenai persoalan hukuman sebelum ianya dikenakan terhadap beliau.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Ulasan Mahkamah Agong dalam kes *Alan Noor* berhubung dengan tidak perlunya untuk memberikan satu lagi peluang supaya didengar sebelum hukuman dikenakan adalah semata-mata *obiter dicta. Obiter dictum* tersebut adalah nyata salah kerana ianya telah dinyatakan tanpa manfaat suatu hujahan yang matang berdasarkan kesan gabungan per. 5(1) dan 8(1) Perlembagaan Persekutuan. Ianya juga tidak mempunyai manfaat pandangan-pandangan yang dinyatakan dalam kes-kes berautoriti tinggi (high authority), termasuk keputusan Majlis Privi dalam *High Commissioner for India and High Commissioner for Pakistan v. Lall.*

[2] Kesan gabungan per. 5(1) dan 8(1) Perlembagaan Persekutuan adalah untuk menuntut keadilan dalam kedua-duanya prosedur dan juga substans apabila sesuatu keputusan undang-undang awam mempunyai kesan yang bertentangan ke atas mana-mana aspek kehidupan seseorang. Antara aspek-aspek ini adalah reputasi seseorang dan mata pencariannya.

[3] Keadilan prosedur menuntut bukan sahaja hak seseorang pegawai awam untuk membuat representasi atas kebenaran pertuduhan yang dibuat terhadap beliau. Ianya juga termasuk hak, selepas suatu keputusan bersalah dibuat terhadap beliau, untuk membuat representasi ke atas persoalan hukuman.

[4] Responden sepatutnya diberikan satu perbicaraan lisan. Cabaran responden kepada laporan analisa dan kepada identiti sampel air kencing tidak boleh ditolak begitu sahaja disebabkan kelewatan yang keterlaluan antara pengambilan sampel tersebut dan pengeluaran surat tunjuk sebab. Terdapat juga hakikat bahawa sepanjang tempoh perkhidmatan responden yang lama, tidak terdapat aduan salah laku yang pernah dibuat terhadap beliau. Ini adalah dengan itu suatu kes salah laku yang mana adalah nyata tidak sesuai untuk memutuskannya semata-mata atas dasar representasi bertulis. Fakta-fakta di sini menuntut satu perbicaraan lisan. Kegagalan perayu untuk bersetuju dengan permintaan bagi perbicaraan yang sedemikian merupakan satu kegagalan untuk memberikan keadilan prosedur.

Oleh Siti Norma Yaakob HMR

[1] Prosiding di hadapan perayu pertama adalah tidak sempurna/cacat iaitu terdapatnya ketidakadilan prosedur dan oleh itu tidak boleh dipertahankan.

[2] Terdapat dua peringkat dalam prosiding di hadapan perayu pertama. Peringkat pertama adalah penentuan berhubung dengan samada salah laku yang didakwa telah dibuktikan. Sebaik sahaja salah laku telah dibuktikan, peringkat kedua adalah untuk menentukan hukuman yang wajar baginya.

[2a] Hak untuk didengar berlanjutan bukan sahaja kepada peringkat pertama prosiding di hadapan perayu pertama tersebut tetapi juga kepada peringkat kedua sebelum hukuman dijatuhkan. Keadilan menuntut bahawa hak untuk merayu bagi mengurangkan hukuman harus diberikan kepada responden walaupun Perintah Am 26 Kanun tidak menyatakan apa-apa mengenainya.

[3] Surat tunjuk sebab berkenaan menyebut lebih daripada satu hukuman jika responden didapati bersalah atas salah laku yang didakwa itu. Daripada surat tunjuk sebab dan memandangkan hukuman-hukuman alternatif yang mungkin dikenakan, responden seharusnya diberikan peluang untuk merayu bagi mengurangkan hukuman sebelum sebarang hukuman dikenakan terhadap beliau. Ini adalah sejajar dengan peruntukan-peruntukan Perintah Am 23 Kanun. Alasan ini juga seiringan dengan peruntukan-peruntukan per. 135(2) Perlembagaan Persekutuan.

[Rayuan ditolak.]

Case(s) referred to:

Board of Trustees of the Port of Bombay v. Dilipkumar AIR [1983] SC 114 ***(foll)***

Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 ***(refd)***

Francis Coralie v. Union of India AIR [1981] SC 746 ***(foll)***

Ghazi Mohd Sawi v. Mohd Haniff Omar & Anor [1994] 2 CLJ 333 ***(refd)***

High Commissioner for India and High Commissioner for Pakistan v. Lall LR 75 IA 225 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 ***(refd)***

Inspector General of Police v. Alan Noor Kamat [1988] 1 MLJ 260 ***(not foll)***

Jorgensen v. Australian Securities & Investment Commission [1999] FCA 356

Najar Singh v. Government of Malaysia [1976] 1 MLJ 203 ***(refd)***

Kanda v. The Government of Malaya [1962] MLJ 169 ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 3 CLJ 65 ***(refd)***

Pretoria City Council v. Levison [1949] 3 SA 405 ***(refd)***
R v. Defence Board, ex p Anderson [1991] 3 All ER 375 ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 ***(refd)***
Rohana Ariffin & Anor v. Universiti Sains Malaysia [1988] 1 CLJ 559 ***(refd)***
Sowmithri Vishnu v. Union of India AIR [1985] SC 1618 ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 ***(refd)***
Travancore Rayons v. Union of India AIR [1971] SC 682 ***(refd)***

Legislation referred to:
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, O. 4(2)(d), O. 26(1), (2), (4), O. 36(i)

Federal Constitution, arts. 5(1), 21, 135(2)
Government of India Act 1935, s. 240(3)

For the appellants - Asmabi Mohamad SFC (Azizah Nawawi FC with her)
For the respondent - Eric Paulsen; M/s Karpal Singh & Co

[Appeal from High Court, Pulau Pinang; Suit No: 22-322-91]

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

As long ago as March 1991, the respondent was dismissed from the public service. On 6 November 1991 he instituted proceedings for wrongful dismissal. His action was heard and disposed off on 30 May 1996. The learned judge who tried the action held that the respondent had been wrongfully dismissed. He granted the respondent the relief sought by him. The appellants being dissatisfied with the decision appealed to this court. Their appeal was heard and dismissed on 3 May 1999.

The issue in this appeal concerns the right to procedural fairness. It is a constitutional right. It forms one of the cornerstones of our public law jurisprudence. It is an issue which our courts have already dealt with in several cases. See, *Kanda v. The Government of Malaya* [1962] MLJ 169, *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1988] 1 CLJ 559; [1989] 1 MLJ 487; *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261 and the very recent decision of the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 CLJ 65; [1999] 3

MLJ 1. Although the content of procedural fairness is well settled, its application varies according to the facts of each particular case. It is necessary to allude to the factual matrix relevant to this appeal in order to appreciate the issues.

At all material times, the respondent was employed as a hospital attendant at the Penang General Hospital. On 5 May 1990, the respondent underwent a spot urine test. About eight months later, by a letter dated 31 January 1991, the first appellant instituted disciplinary proceedings against the respondent. It is an important document. The judge produced it *in extenso* in his judgment. We will merely reproduce the relevant portion of that letter. When translated into English it reads as follows:

> [T]he Disciplinary Board, after considering all information received, is of the view that you are to be subjected to disciplinary action with a view to dismissal or demotion pursuant to General Order 26, Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 on the following charges:
>
> > That you, Mr. Utra Badi a/l K. Perumal, while on duty as a Hospital Attendant T. Biasa in the General Hospital, Penang in an on-the-spot urine test on 5th May, 1990 was confirmed to be a drug addict because a urine sample taken was found to be positive for morphine. Your act in becoming a drug addict amounts to an act which can bring disrepute to the Public Service and which contravenes the conduct under General Order 4(2)(d), Public Officers (Conduct and Discipline) (Chapter D) General Order 1980.
>
> If you are found guilty, you will be punished pursuant to General Order 36 of the same General orders.
>
> Pursuant to General Order 26 of the General Orders (Conduct & Discipline) (Cap. D) you are required to make a written representation setting out the grounds upon which you seek to exculpate yourself.

For completeness, I will reproduce the three General Orders referred to in the aforesaid letter.

The first is General Order 4(2)(d) which reads:

> (4) The following is the code of conduct of officers in the public service. The breach of any of the provision of this code by an officer renders him liable to disciplinary action under these General Orders:
>
> (2) An officer shall not –
>
> (d) conduct himself in such manner as to bring the public service into disrepute or to bring discredit thereto;

The second is General Order 26 which reads as follows:

26(1) Where it is represented to, or is found by, the Appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.

(2) The Appropriate Disciplinary Authority shall, after considering all the available information in its possession that there is a *prima facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

(3) If after consideration of the said representation, the Appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.

(4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(5) Where the Appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.

(6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and if the Committee shall so determined, shall be required to appear before the Committee and exculpate himself.

(7) If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(8) The Committee may, permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission:

Provided that where the Committee permits the Government to be represented, it shall also permit the officer to be similarly represented.

(9) If, during the course of the inquiry, further grounds for dismissal are disclosed, and the Appropriate Disciplinary Authority thinks fit to proceed against the officer upon such grounds, the officer shall be furnished with a written statement thereof and the same steps shall be taken as are prescribed above in respect of the original grounds.

(10) The Committee having inquired into the matter, shall make a report to the Appropriate Disciplinary Authority. If the Disciplinary Authority considers that the report is not clear in any respect or that further inquiry is desirable, the matter may be referred back to the Committee for further inquiry and report.

(11) If, upon considering the report of the Committee the Appropriate Disciplinary Authority is of the opinion –

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;

(b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question of pension will be dealt with under The Pensions Act.

The third and final provision is General Order 36 which reads as follows:

(36) A Disciplinary Authority may impose on an officer any one or any combination of two or more of the following punishments:

(a) warning;

(b) reprimand;

(c) fine;

(d) forfeiture of salary;

(e) stoppage of increment;

(f) deferment of increment;

(g) reduction of salary;

(h) reduction in rank;

(i) dismissal.

Returning to the narrative, the respondent, upon receiving the aforesaid letter, made a representation in writing as required by the letter of 31 January 1991. His letter is dated 7 February 1991. He did not write it himself. He enlisted the help of a petition writer to draft the letter. In his letter, the respondent denied that he was a drug addict. He asked for another urine test to be conducted to prove his innocence. From the tenor of the letter, it appears that he had made a similar request upon an earlier occasion. He said that it was possible that the urine that has tested positive for drugs was not his sample. He referred to the fact that he had served the Government for 27 years without a blot upon his character.

About a month later, on 20 March 1991, the first appellant wrote a letter to the respondent dismissing him from service. The letter adverts to a meeting of the first appellant held on 21 March 1991, at which, after examining the charge and the respondent's representation, it was decided that the respondent be dismissed from service. It is common ground that the respondent was not afforded an oral hearing. It is also common ground that the respondent was not afforded an opportunity to make a plea in mitigation upon the issue of punishment.

The respondent challenged his dismissal by way of a suit. He gave evidence at the trial of his action. His testimony was confined to the undisputed facts of the case. For the appellants, DW1, the Deputy Director of Health for the State of Pulau Pinang gave evidence. He confirmed that the only reason for the respondent's dismissal was the fact that the urine test proved positive. This witness said that the first appellant was aware of the respondent's stand that there could have been a mistake as to the identity of the urine sample and of the other factors mentioned by the respondent. The evidence of DW1 makes it patently clear that the first appellant was acting purely upon the results of the urine test. The learned judge, after a careful consideration of the evidence and the arguments before him, found for the respondent and held that his dismissal was null and void.

In the court below, the mainstay of the appellants' case was that they were under no duty to afford the respondent an opportunity to mitigate before punishment was imposed. It was argued that the show cause letter dated

31 January 1991 was sufficient. In support of that argument, the appellants relied on certain observations (to which I will refer at some length in due course) made by Salleh Abas LP, in *Inspector General of Police v. Alan Noor bin Kamat* [1988] 1 MLJ 260. The learned judge treated these observations as mere *obiter dicta.* He examined the authorities and concluded that the observations of the learned Lord President did not represent the law upon the subject. He held that in the state of current authority, the appellants had not afforded procedural fairness to the respondent.

Before this court, the appellants criticised the learned judge's approach on two grounds. First, the learned judge was wrong in treating the observations of the learned Lord President in the aforementioned authority as mere *obiter dicta.* They were part of the *ratio decidendi.* Second, even if the remarks of Salleh Abas LP, were made *obiter,* they represent the law upon the subject at hand. These arguments necessitate an examination of the decision upon which the appellants place much reliance.

In *Inspector General of Police v. Alan Noor bin Kamat (ibid),* the facts were these. The plaintiff, a probationary inspector received a letter from the defendant asking him to show cause within 15 days why disciplinary action should not be taken against him in respect of three charges framed against him. The letter purported to be on the instructions of Deputy Inspector-General of Police in exercise of disciplinary powers delegated to him by the Police Force Commission. The letter did not state that the defendant contemplated punishing the plaintiff by reducing his rank. The plaintiff made representations in writing in answer to the allegations raised against him. However, his reply was ten days out of time. More than a year later, the defendant imposed on the plaintiff the punishment of demotion to original rank on the first charge and fines for the second and third charges. The plaintiff challenged the defendant's action. At first instance, Ajaib Singh J, (as he then was) held for the plaintiff ([1987] 1 CLJ 51). He did so upon the sole ground that the letter issued by the Deputy Inspector General of Police was a nullity. He advanced four reasons for his finding. They appear sufficiently from the following passages in his judgment (at pp. 55 & 56):

> Now surely the Deputy Inspector-General of Police was in no position to say that he was exercising 'the disciplinary powers which have been delegated to him by the Police Force Commission'. By the Instrument of Delegation (PU(B) 548) the Police Force Commission delegated its disciplinary powers to the Inspector-General of Police to initiate disciplinary action with a view to imposing the punishment of dismissal or reduction in rank of certain senior police officers. This delegated power is personal to the Inspector-General of Police and he cannot in turn delegate it further to anyone else – *delegatus non potest delegare.*

…

The letter of 14 May 1980 set out three charges of indiscipline against the plaintiff. But there is no provision in reg. 30 for any charges to be preferred.

Under reg. 30(2) the Inspector-General of Police had to give grounds on which it was proposed to dismiss or reduce the plaintiff in rank and call upon him to state in writing within a period of not less than 14 days a representation containing grounds upon which he relied to exculpate himself. The letter of 14 May 1980 set out no grounds on which it was proposed to dismiss or reduce the plaintiff in rank as required but set out three charges which were not required.

Another flaw in the letter of 14 May 1980 is that there is no mention of the proposed punishment. Under reg. 30(2) it is incumbent upon the disciplinary authority to state that it is proposed to either dismiss the officer or reduce him in rank. This omission was clearly in breach of reg 30(2) which rendered the letter of 14 May 1980 nugatory.

Having found the letter in question to be invalid, he however, went on to say as follows (at p. 462):

The plaintiff sent a reply to the Deputy Inspector-General of Police on 7 June 1980 giving his explanations on the 3 charges. After considering these explanations and having found that the plaintiff had failed to exculpate himself *it was incumbent upon the Inspector-General of Police thereafter to give the plaintiff an opportunity to make a plea in mitigation on punishment. This right of the plaintiff to be heard in mitigation is implied in reg. 27 of the General Orders and in Article 135(2) of the Federal Constitution for otherwise it cannot be said that the plaintiff had been given a reasonable opportunity of being heard.* He had to be heard throughout the proceedings from the beginning to the end. Isn't it a fair and reasonable expectation of any person condemned for a wrong that he would be heard in mitigation before any punishment is imposed on him? (emphasis added.)

The defendant's appeal to the Supreme Court failed. Salleh Abas, LP, who delivered the judgment of the Supreme Court, (at p. 261 of the report), identified the issues that arose for decision in the appeal:

Two issues are involved in the application of GOD 30 to this case, namely, (1) who is the proper Disciplinary Authority, and (2) having regard to the punishment of reduction in rank imposed on the respondent, whether the show cause letter which did not direct the respondent's attention to the possibility of such punishment has sufficiently complied with the requirements of para (2) of GOD 30. Either of these issues is vital to the case.

He then went on to say as follows:

> As regards the first issue, we are of the view that the learned judge was correct. The respondent was at the material time a probationary police inspector and as such, according to the instrument of delegation of power by the Police Service Commission dated 18 February 1971 (PU(B) 548/75), the IGP was the proper Disciplinary Authority, he being vested with the delegated power to take disciplinary proceedings against 'all senior police officers of the rank of probationary inspector up to and including chief inspector' (*vide* item 15 of the Instrument of Delegations). But what happened in this case was that the show cause letter dated 14 May 1980, which was signed by Penolong Pengarah Pengurusan (Tatatertib) on behalf of the IGP, had clearly stated that the letter was sent on the direction not of the IGP but of the Deputy IGP. Although the letter dated 21 August 1981 conveying the punishment appeared to have been written on the instruction of the IGP, in our judgment this does not satisfy the requirement of the GOD 30. The authority informing the punishment must be the same authority that instructs the proceeding leading to the punishment. Oral evidence was led to the effect that the IGP gave his instructions to his deputy to initiate the impugned disciplinary proceeding. In our view, such evidence should not be admitted and if admitted should not be acted upon because it is clear that under s. 91 of the Evidence Act no evidence can be given in proof of any matter which is required by law to be reduced to a form of a document and s. 92 prohibits the giving of oral evidence to contradict or vary or explain the terms of such document. A show cause letter has to be in the form of a document because para (2) of GOD 30 required a Disciplinary Authority to send to the officer who is subject to a disciplinary proceeding 'a statement in writing, prepared, if necessary, with the aid of the Legal Department'. Since the letter to show cause clearly said that the Deputy IGP has caused the letter to be sent, **on that ground alone the appeal should be dismissed.** (emphasis added.)

It is plain from the concluding words in the foregoing passage (to which we have lent emphasis) that the defendant's appeal could have been disposed of upon the first issue. However, the learned Lord President proceeded to deal with the other issue as well. He said:

> As regards the second issue, ie, whether or not there has been sufficient compliance of para (2) of GOD 30, our views are as follows.
>
> Reduction in rank and dismissal are the two most severe punishments that can be imposed upon a civil servant guilty of misconduct. For this reason, the proceedings with a view to dismissal or reduction in rank have to be slightly different in that the show cause letter must bring to the attention of the civil servant concerned of the contemplated punishments to make him appreciate the gravity of the situation and thus enable him to give a satisfactory explanation as best as he could. This is clear from the wording contained in para (2) of GOD 30, ie, 'a statement in writing, prepared, if necessary, with the aid of

the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank ...' This phraseology 'of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank', however, does not appear in GOD 29 which deals with disciplinary proceedings not meriting punishment of dismissal or reduction in rank.

Looking at the show cause letter dated 14 May 1980, we see nothing in it which shows that the Disciplinary Authority intended or contemplated the punishment of reduction in rank. It is not therefore surprising for the respondent to reply to the allegation of misconduct without assistance of counsel which he said in his evidence he would have done if he had known the gravity of the situation he had to face.

Furthermore, the time lapse between his reply and the punishment clearly gave him hope that whatever punishment to be imposed on him will not be so serious as the one actually imposed. In our view, the Disciplinary Authority here made a fatal mistake which rendered the disciplinary proceedings null and void. (emphasis added.)

The learned Lord President, having dealt with the two issues that arose for decision went on to criticise the observation of Ajaib Singh J, in the passage earlier quoted. He said (at p. 262):

As it stands, this passage appears to be misleading. *This passage should be read in the light of the factual situation of this case, wherein the show cause letter dated 14 May 1980 was completely silent as to the contemplated punishment to be imposed at the end of the disciplinary proceedings.* Therefore, in order to ensure that the respondent understood and appreciated the seriousness of the proceedings he was facing, the learned trial judge was right in insisting that another chance must be given to him, which he called a plea of mitigation. *If, however, the show cause letter had included the proposed punishment,* for example, by the inclusion of such statement as 'This proceeding is taken against you with a view to dismissal or reduction in rank ...' or 'This proceeding is taken under GOD 30 with a view to dismissal or reduction in rank' ..., or such other phraseology as would give the effect of making the respondent understand the nature of the proceedings and what they would lead to, *there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed.* (emphasis added.)

Having regard to the appellants' arguments, it is necessary now to see if, on an application of established tests, whether the foregoing remarks form part of the *ratio decidendi* or are mere *obiter dictum.*

In *Co-operative Central Bank Ltd. v. Feyen Development Sdn. Bhd.* [1997] 2 MLJ 829, at p. 835-6, Edgar Joseph Jr. FCJ, explained the distinction between these two parts of a judgment as follows:

> *[O]biter dictum* is a mere chance remark by the court and is used in contradistinction to *ratio decidendi* – the rule of law for which a case is authority.

An authoritative description of what constitutes the *ratio decidendi* of a case was rendered by Schreiner JA, in *Pretoria City Council v. Levison* [1949] 3 SA 405, at p. 417:

> As I understand the ordinary usage in this connection, where a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the *ratio decidendi*, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts and (c) (this may cover (a)) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons.

Schreiner JA, had in mind a single judgment of a court when he suggested the foregoing test. This court is also concerned only with a single judgment of the Supreme Court. Hence, I consider it quite safe to apply the approach suggested by Schreiner JA, when interpreting the judgment of the Supreme Court in *Inspector General of Police v. Alan Noor bin Kamat (supra)*.

Applying that test, the finding by the Supreme Court on the first of the two issues that arose for its decision is certainly *ratio decidendi*. The decision upon the second issue **may** also be part of the *ratio*. I say "may" advisedly, because it was not strictly necessary for the court to have entered upon the second issue in light of the learned Lord President's concluding remarks on the first issue. Nevertheless, I am, *ex abundanti cautela*, prepared to accept the finding upon the second issue also as part of the *ratio* on the basis that a judgment may have more than one *ratio*. However, I am unable, on a proper application of the test, accept the remark of the learned Lord President that "there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed" as forming part of the ratio in *Alan Noor's* case.

I am therefore satisfied that both Ajaib Singh J's remark at first instance and the Supreme Court's comment upon it on the appeal in *Inspector General of Police v. Alan Noor bin Kamat (ibid)* are both merely obiter dicta as they were unnecessary for the actual decision in that case. It follows that I am in agreement with the learned trial judge in his interpretation of that case. I must, for that reason, reject the first submission advanced by the appellants in criticism of this part of the learned judge's judgment.

That brings me to the appellants' second argument. What is urged upon this court is the proposition that in disciplinary proceedings brought against a member of the public service, there is no separate right (or the legitimate expectation of a right) to make representations upon the question of the punishment that ought to be meted out to him.

To recapitulate, in *Inspector General of Police v. Alan Noor bin Kamat (ibid)*, Ajaib Singh J, at first instance, took the view that the disciplinary process involved two separate exercises, the first a finding as to guilt and the second as to punishment. However, the Supreme Court was of opinion that both guilt and punishment are to be considered in one composite exercise. That, in essence, is the difference in the approach.

With much respect, I am unable to accept the view subscribed to by the Supreme Court. In my judgment, save in those cases falling under Part III of the General Orders, there are two separate and distinct steps in the public service disciplinary process. The first step is for the disciplinary authority to decide upon the issue of guilt or innocence. If the decision is in favour of the employee, that is the end of the matter. But if the relevant authority finds the public servant guilty, then, and then only, does the question of punishment arise. And as may be seen from General Order 36 that there is a wide choice in the type of punishment that may be meted out. As may be seen from General Order 36, it ranges from a mere warning to the ultimate punishment of dismissal.

Now, it cannot be gainsaid that any sort of punishment imposed upon a public servant has serious consequences. It carries with it a stigma. It tarnishes reputation. The authorities are now well settled that the punishment of dismissal deprives a person of his livelihood and therefore of his "life" within the meaning of that expression in art. 5(1) of the Federal Constitution. See, *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 144; *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor (supra); Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* [1997] 1 CLJ 665; [1996] 1 MLJ 481.

Similarly, when a person is deprived of his reputation, it would in my judgment, amount to a deprivation of "life" within art. 5(1) of the Federal Constitution. The right to reputation is part and parcel of human dignity. And it is the fundamental right of every person within the shores of Malaysia to live with common human dignity. I derive support for this view from the decisions of the Indian Supreme Court in two cases. The first is *Francis Coralie v. Union of India* AIR [1981] SC 746. In that case, Bhagwati J, (later CJ), when interpreting the expression "life" in art. 21 of the Indian Constitution (the equipollent of our art. 5(1)) said (at p. 752):

While arriving at the proper meaning and content of the right to life, we must remember that it is a constitutional provision which we are expounding and moreover it is a provision enacting a fundamental right and the attempt of the court should always be to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content. The luminous guideline in the interpretation of a constitutional provision is provided by the Supreme Court of United States in *Weems v. US* [1909] 54 L Fd 793 (801).

> Legislation, both statutory and constitutional is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had therefore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it'. The future is their care and provisions for good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in the words might be lost in reality. And this has been recognised. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.

This principle of interpretation which requires that a constitutional provision must be construed, not in a narrow and constricted sense, but, in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilised but remains flexible enough to meet the newly emerging problems and challenges applies with greater force in relation to a fundamental right enacted by the Constitution. The fundamental right to life which is the most precious human right and which forms the arc of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.

In a later passage in his judgment (at p. 753), Bhagwati J, added:

> But the question which arises is whether the right to life is limited only to protection of limb or faculty or does lit go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

The second authority is *Board of Trustees of the Port of Bombay v. Dilipkumar* AIR [1983] SC 114, where Desai and Misra JJ, when dealing with a case of disciplinary inquiry said (at p. 114):

> And this view was taken as flowing from Article 21 which mandates that no one shall be deprived of his life or liberty except in accordance with the procedure prescribed by law. The expression 'life' does not merely connote animal existence or a continued drudgery through life. The expression 'life' has a much wider meaning. **Where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person ... the same can be put in jeopardy only by law which inheres fair procedures.** (emphasis added.)

I would also mention in passing that the Supreme Court of India in *Sowmithri Vishnu v. Union of India* AIR [1985] SC 1618 at pp. 1621& 1622, appears to have accepted an argument that the expression "life" in art. 21 of the Indian Constitution includes a person's reputation.

The combined effect of arts. 5(1) and 8(1) of the Federal Constitution is, in my judgment, to demand fairness both in procedure and in substance whenever a public law decision has an adverse effect on any of the facets of a person's life. See, *R Rama Chandran v. The Industrial Court of Malaysia & Anor (ibid)*; *Kumpulan Perangsang Selangor Bhd v. Zaid bin Haji Mohd Noh* [1997] 2 CLJ 11; [1997] 1 MLJ 789. Among these facets are a person's livelihood and his reputation.

Procedural fairness demands not only the right in a public servant to make representations on the truth of the charges framed against him. It includes the right, after a finding of guilt is made against him, to make representations on the question of punishment. That this must be the case may be seen by examining the disciplinary process itself.

In my view, the *obiter dictum* of the Supreme Court in *Inspector General of Police v. Alan Noor bin Kamat (ibid)* is plainly wrong. It was expressed without the benefit of a mature argument upon the combined effect of arts. 5(1) and 8(1) of the Federal Constitution. Neither did it have the benefit of the views expressed in several cases of high authority, including the decision of the Privy Council in High Commissioner for India and High Commissioner for *Pakistan v. Lall* LR 75 IA 225. In that case, the Board dealt with the identical issue that has arisen for consideration in the present appeal. The relevant provision in that case was s. 240(3) of the Government of India Act 1935. That sub-section, which dealt with, *inter alia*, the dismissal of public servants read as follows:

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this sub-section shall not apply –

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge.

The respondent, a member of the Indian civil service, had been dismissed on charges, which included an allegation of nepotism, without having been given an opportunity to show cause against the making of the order of dismissal. The Privy Council upheld the decision of the Federal Court striking down the order of dismissal. Lord Thankerton, in the course of delivering the advice of the Board, made the following observation (at p. 242 of the report):

> **Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage.** If the civil servant has been through an inquiry under r. 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and **he would still be entitled to represent against the punishment proposed as the result of the findings of the inquiry.** (emphasis added.)

The learned judge referred to the foregoing passage in his judgment. He relied upon it in preference to the *obiter dicta* expressed in *Alan Noor*'s case. He also based his decision upon the judgment of this Court in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor. (ibid)*. I think that the learned judge's approach was entirely in consonance with the doctrine of *stare decisis* and with judicial discipline.

The position is made clearer when one compares the present case to one falling under Part III of the General Orders. This is where a member of the public service is either convicted of a criminal offence or an order of detention, restricted residence, supervision, banishment or deportation is made against him. In all such cases there is no second right to representation is available to a public servant on the issue of punishment because General Order 35 expressly excludes any such right. And this is entirely consonant with proviso (a) and (d) to art. 135(2) of the Federal Constitution.

There is one final point in this appeal that I think I ought to mention. It has to do with the respondent's argument in the court below that he had not been afforded an oral hearing. Now, it is true, that there are several decisions of our courts that hold that an oral hearing is not the *sine qua*

non of procedural fairness. See, *Najar Singh v. Government of Malaysia* [1976] 1 MLJ 203; *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar & Anor* [1994] 2 CLJ 333; [1994] 2 MLJ 114. However, in *Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 CLJ 619; [1995] 1 MLJ 308, I expressed the view that cases may arise where the failure to afford an oral hearing may result in the decision arrived at being declared a nullity. That is a view to which I continue to adhere. Indeed, in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor (supra)*, the Federal Court recognised the need to have an oral hearing in planning cases. See the judgment of Edgar Joseph Jr. FCJ, at pp. 60-61 of the report.

My limited research reveals that English, Indian and Australian jurisprudence upon the subject is akin to our own. It suffices to refer to just one authority from each of these jurisdictions.

In *R. v. Defence Board ex parte Anderson* [1991] 3 All ER 375, Taylor LJ (later Lord Chief Justice) expressed the principle in the following terms (at p. 388):

> The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing: see *Local Government Board v. Arlidge* [1915] AC 120 at 132-133, [1914-15] All ER Rep 1 at 7, *Selvarajan v. Race Relations Board* [1976] 1 All ER 12 at 19, [1975] 1 WLR 1686 at 1694 and *R v. Immigration Appeal Tribunal, ex p Jones* [1985] 2 All ER 65 at 68, [1988] 1 WLR 477 at 481. **Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made.** It will also depend upon whether there are substantial issues of fact which cannot be satisfactorily resolved on the available written evidence. This does not mean that, whenever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other. Sometimes the conflict is not central to the issue for determination and would not justify an oral hearing. Even when such a hearing is necessary, it may only require one or two witnesses to be called and cross-examined. (emphasis added.)

Similarly, the Supreme Court of India in *Travancore Rayons v. Union of India* AIR [1971] SC 682, while affirming the general rule, recognised that there may be cases where an oral hearing may be called for in the interests of justice. The court was of the view that an oral hearing would be warranted in cases involving complicated questions of fact.

I pause to say that the reference in *ex parte Anderson (ibid)* to "substantial issues of fact" and in *Travancore Rayons v. Union of India (supra)* to "complicated questions of fact" is not to be read restrictively. They are merely descriptive of one of the many types of situations in which procedural fairness would demand an oral hearing. It is to be emphasised that the categories of cases where procedural fairness demands an oral hearing are not closed.

In Australia, the point was considered recently in *Jorgensen v. Australian Securities & Investment Commission* [1999] FCA 356. In that case Heerey J, said:

> The rule *audi alterem partem*, literally 'to hear the other side', need not necessarily mean an oral hearing. In *Chen v. Minister for Immigration* [1994] 48 FCR 591 a Full Court of this Court (Black CJ Lee and Heerey JJ) held that an applicant for refugee status seeking departmental review of a primary decision to refuse status was not necessarily entitled to an oral hearing. The Court said (at 597):
>
> > It is beyond argument that the rules of natural justice do not mandate in all cases an oral hearing for the person affected. This was recognised by the House of Lords in *Local Government Board v. Arlidge* [1915] AC 120 at 133. There have been many developments of the law in this area since Arlidge but it remains clear that an oral hearing is not necessary in every case. Thus, in *Heatley v. Tasmanian Racing and Gaming Commission* [1977] 137 CLR 487, where the High Court was concerned with a statutory power conferred on the respondent to warn off persons from racecourses, Aikin J said (at 516):
> >
> > > Fairness requires that the person affected should, save in an emergency, be given notice by the Commission of its intention to issue a warning-off notice and of the grounds for that action and should be afforded an opportunity to make representations to the commission on his own behalf, which it must consider before taking action. A notice effective for an indefinite period should not be issued without compliance with at least those procedural requirements. I do not think that fairness requires in this context an oral hearing though in some circumstances the Commission may well find that it cannot resolve inconsistencies between its information and written submissions from the person concerned without such a hearing. It is however for the Commission itself to devise its own procedures in the light of its obligation to act fairly.

Ought the respondent in the present case to have been given an oral hearing? I think he ought. There is a combination of circumstances in the present instance that made an oral hearing essential.

The sole ground upon which the appellants acted was the analysis report. DW1 testified to this fact in his evidence. However, the respondent challenged the findings of the analyst principally on the ground that he was not a drug addict. He also put in issue the identity of the urine sample that was sent for analysis and called for a fresh test. The respondent's challenge cannot be rejected out of hand because of the long delay between the taking of the sample and the issuance of the show cause letter. Added to this is the fact that throughout the respondent's long term of service, no complaint of misconduct had ever been made against him. This was therefore a case of alleged misconduct that was manifestly unsuitable for resolution purely on the basis of written representations. In my view, the facts here demanded an oral hearing. The appellants' failure to accede to the respondent's request for such a hearing, on the facts of the instant case, constitutes a failure to accord procedural fairness. I would, therefore, uphold the judgment of the learned judge on this additional ground.

I have, since writing this judgment, read the draft judgment of my learned sister Siti Norma Yaakob JCA. I entirely concur with her views.

For the reasons already given, the appeal was dismissed without calling upon counsel for the respondent. The orders made by the learned judge were affirmed. There was no order as to costs made against the appellants.

Siti Norma Yaakob JCA:

This appeal came to us by way of a judicial review and it stems from a wrongful dismissal suit brought by the respondent against the appellants. The respondent's claim for a declaration that his dismissal as a Hospital Attendant at the General Hospital Penang, was null and void, was allowed with costs by the High Court at Penang which also declared that the respondent is still a Hospital Attendant and is entitled to all his salaries and benefits due to him as such.

The facts of this appeal were in no way disputed. The second appellant employed the respondent as a Hospital Attendant and at all material times, the respondent worked at the General Hospital, Penang. On 5 February 1991, the respondent received a show cause letter dated 31 January 1991, from the first appellant, asking him why disciplinary action under the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, ("the Code") should not be taken against him with a view to his dismissal or demotion on the ground that a sample urine taken from him on 5 May 1990, was tested positive for morphine. He was charged that as a drug addict, his conduct would discredit the public service and bring it into disrepute, a breach of General Order 4(2)(d) of the Code, the

punishment for which is set out in General Order 36 of the Code. The respondent was given 14 days from the date of the receipt of the letter to make his written representations to exculpate himself.

The respondent did so in his letter dated 7 February 1991, wherein he

(1) denied that he was a drug addict.

(2) be given another opportunity to have his urine tested.

(3) raised the possibility that the sample urine tested on 5 May 1990, was not his but might belong to some other person.

(4) had no intention to taint his long record of service and

(5) had never been subjected to any form of disciplinary action during his 27 years service with the second appellant.

On 20 March 1991, the first appellant informed the respondent that atter considering the charge and his reply to it, it was decided that he be dismissed from his present employment as a Hospital Attendant with effect from 20 March 1991, under General Order 36(i) of the Code. The respondent was also informed that he had the right to appeal to the Disciplinary Appeal Board against the punishment through his Head of Department within 14 days of the receipt of the letter.

The respondent did so and in his letter dated 26 March 1991, he set out 11 reasons why the charge and the punishment imposed on him should be set aside or reviewed as he maintained that he was not a drug addict nor was he in any way involved in the use of drugs.

The Disciplinary Appeal Board was not impressed by the reasons given by the respondent, rejected his appeal and confirmed the punishment imposed by the first appellant, a decision that was made known to the respondent through the first appellant's letter dated 4 July 1991. This led to the respondent filing a writ action on 20 November 1991, against the appellants challenging the validity of his dismissal and praying for the declaratory reliefs that I had mentioned earlier as well as consequential reliefs for an inquiry to determine all the benefits due to him, damages, interests and costs.

In the court below, three issues were raised. Two were decided in favour of the appellants and one against. It was on the ground of the latter unfavourable finding that judgment was entered against the appellants and before us that same issue was taken and was the only issue raised. It related to whether there had been procedural unfairness when the

respondent was not given the opportunity to mitigate before the first appellant decided to terminate his services as a Hospital Attendant especially when more than one punishment had been held out as a possible punishment for the charge that he had been found guilty of. Clearly what was being questioned was the decision making process of the first appellant and not the decision itself.

In rebutting the respondent's contention that there had been procedural unfairness, the appellants contended that the disciplinary proceedings before the first appellant were conducted pursuant to the provisions of General Order 26(1), (2) and (4) of the Code and since there is no provision as to the right to be heard on the question of punishment, the respondent had no cause to complain that he had been denied of such a right. Moreover in the letter to show cause, not only were particulars of the alleged misconduct set out but that the respondent was also put on notice as to the type of punishment that would be meted out to him and in making his defence to the specific charge, he had every opportunity to mitigate as well but he chose not to do so. For this contention the appellants relied on the Supreme Court decision of *Inspector-General of Police & Anor. v Alan Noor bin Kamat* [1988] 1 MLJ 260, where the following observation was made:

> If however, the show cause letter had included the proposed punishment, for example, by the inclusion of such statement as "This proceeding is taken against you with a view of dismissal or reduction in rank or ..."or "This proceeding is taken under G.O.D. 30 with a view of dismissal or reduction in rank ...", or such other phraseology as would give the effect of making the respondent understand the nature of the proceedings and what they would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed.

Like the court below, I was not persuaded to adopt the aforesaid observation as such observation was made obiter.

Part II of the Code sets out the procedure under which disciplinary proceedings can be commenced against an officer in the public service. General Order 26 (1), (2) and (4) under which disciplinary proceedings were taken against the respondent contain the following provisions:

> 26(1) Where it is represented to, or is found by, the Appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion or the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.

(2) The Appropriate Disciplinary Authority shall, after considering all the available information in its possession that there is a *prima facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period or not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

(3) ...

(4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which falls to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

Clearly there were two stages in proceedings before the first appellant. The first was the determination as to whether the alleged misconduct had been made out after considering all the facts of the allegation and the grounds on which the respondent relied to exculpate himself. Once the misconduct had been established, the second stage was to determine the appropriate punishment to commensurate with the misconduct committed by the respondent. It was at this second stage of the proceedings that the respondent maintained that he was entitled to be heard as to his plea in mitigation. I agreed with him for the following reasons.

The show cause letter mentioned more than one punishment if he was found guilty of the misconduct preferred against him. In the first part of the letter, two alternative punishments were identified namely dismissal or reduction in rank. After particularising the charge or misconduct against him the letter went further to state that his conduct as a drug addict was a breach of General Order 4(2)(d) or the Code, the punishment for which is provided by General Order 36, which sets out nine different punishments as follows:

(a) warning;

(b) reprimand;

(c) fine;

(d) forfeiture of salary;

(e) stoppage of increment;

(f) deferment of salary;

(g) reduction of salary;

(h) reduction in rank;

(i) dismissal.

The Code gives the first appellant the power to impose any one or the aforesaid punishments or a combination of two or more.

From the language of the show cause letter and in the light of the alternative punishments that might be imposed on the respondent, it was my considered opinion that the respondent should have been given the opportunity to plead in mitigation before any punishment was meted against him. This reasoning I say runs in line with the provisions of General Order 23 which states that in all disciplinary proceedings under Part II of the Code no officer shall be dismissed or reduced in rank unless he has been afforded a reasonable opportunity of being heard. My reasoning, too, harmonises with the provisions of art. 135(2) of the Federal Constitution which provides that no member of the public service "shall be dismissed or reduced in rank without being given reasonable opportunity or being heard".

In the circumstances of this appeal, I say that the right to be heard extended not only to the first stage of the proceedings before the first appellant but also to the second stage before punishment was passed. In this instance the first appellant accorded the respondent the opportunity to be heard in answer to the charge but had denied his right to plead in mitigation before dismissing him. Since dismissal has been identified by the first appellant to be one of two punishments that could be imposed on the respondent and I am mindful that dismissal is the most extreme punishment that could befall a public servant, justice and fair play dictate that the right to plead in mitigation should have been accorded to the respondent although General Order 26 of the Code under which these proceedings were brought is silent on this score. Under these circumstances I say that the proceedings before the first appellant were flawed in that there had been procedural unfairness and as such cannot be sustained. For this very reason, I had dismissed the appeal, confirmed the orders of the learned trial judge but made no order as to costs as counsel for the respondent was not invited to respond to the appellants' submission.

Mokhtar Sidin JCA:

I have the opportunity of reading the judgment of my learned brother Gopal Sri Ram, JCA and the judgment of my learned sister Siti Norma Yaakob JCA. I am in total agreement with the reasonings and the conclusions in both judgments which in my opinion have covered all the points. With that I have nothing further to add.